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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 964

JAMES RUSSELL HAWTHORNE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ARNOLD M. WEINER,
Ten Light Street,
Baltimore, Maryland 21202,

SANFORD JAY ROSEN,
School of Law,
University of Maryland,
Baltimore and Greene Streets,
Baltimore, Maryland 21201,

Counsel for Petitioner.

The Daily Record Co., Baltimore, Md. 21203

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JAMES RUSSELL HAWTHORNE,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

James Russell Hawthorne, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered February 3, 1966, affirming in part a judgment of conviction of the United States District Court for the Southern District of West Virginia, and, also, the judgment of the United States Court of Appeals for the Fourth Circuit, entered on December 12, 1966, affirming an amended order of the United States District Court for the Southern District of West Virginia.

OPINIONS BELOW

The first opinion of the Court of Appeals, reported as *United States of America v. James Russell Hawthorne*, 356 F. 2d 740 (4th Cir., 1966), is printed as Appendix A hereto.

The second opinion of the Court of Appeals, reported as *United States of America v. James Russell Hawthorne*, ... F. 2d ..... (4th Cir., 1966), is printed in Appendix B hereto.

JURISDICTION

On November 25, 1964, after a jury trial, Petitioner was convicted of two charges of use of interstate facilities to promote illegal gambling enterprises in violation of 18 U.S.C.A., Sec. 1952, and he was sentenced to concurrent five-year terms of imprisonment. On February 3, 1966, the Court of Appeals reversed the conviction as to the first count of the indictment, and, affirming the conviction as to the charge of the second count, remanded the case to the District Court for reconsideration of the sentence which had been imposed. This Court denied certiorari. 384 U.S. 908 (1966).

The hearing on the remand was held in the District Court on May 23, 1966, at Charleston, West Virginia. An amended order was entered, sentencing Petitioner to a term of imprisonment for two years. On December 12, 1966, the Court of Appeals affirmed the amended order.

Jurisdiction to review the judgments in question by writ of certiorari is conferred on this Court by 28 U.S.C.A., Sec. 1254(1). On the jurisdiction to review the judgment of February 3, 1966, see also, *e.g.*, *Mercer v. Theriot*, 377 U.S. 152, 153-54; *Reece v. Georgia*, 350 U.S. 85, 87; *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 257-58.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in the second appeal, in not holding that the record of the proceedings on remand demonstrated that the District Judge was biased or preju-

diced within the meaning of the Sixth Amendment and controlling authorities, and, consequently, unable to exercise his sound discretion in passing sentence?

2. Did the Court of Appeals err in the first appeal when it held that intent to violate local law is an essential element of the offenses punished by 18 U.S.C.A., Section 1952 only when such intent is necessary to constitute a crime under the law of the jurisdiction in which the illegal enterprise is located, notwithstanding the facts that: (a) Section 1952 is a felony statute carrying severe penalties whereas the local offenses are often minor misdemeanors; (b) the legislative history of Section 1952 demonstrates clear congressional purpose to the contrary; and (c) the reading adopted by the Court of Appeals raises a serious constitutional question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Federal Anti-Racketeering Act, codified in 18 U.S.C.A., Section 1952, relating also to the Indiana statute prohibiting slot machines, Sections 10-2326 and 10-2328 of Burns Indiana Statutes, the right to travel guaranteed by the Ninth Amendment and the due process clause of the Fifth Amendment to the Constitution of the United States and the rights to an unbiased tribunal and to a jury trial guaranteed by the Sixth Amendment to the Constitution. They are set forth as Appendix C hereto.

STATEMENT OF THE CASE

On September 18, 1963, the Grand Jury for the Southern District of West Virginia returned a two-count indictment against James Russell Hawthorne, charging him with two violations of 18 U.S.C.A., Section 1952. The first count alleged that on or about October 11, 1962, Mr. Hawthorne

traveled from Elkhart, Indiana, to Greenbrier County, in the Southern District of West Virginia, "with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, said unlawful activity being the operation of the 19th Hole, a business enterprise involving gambling in violation of Chapter 61, Article 10, Section 1, of the Code of the State of West Virginia, that is Keeping and Exhibiting a Gaming Table and Device," and that "thereafter, in the Southern District of West Virginia, said defendant did perform and attempt to perform acts facilitating the carrying on of said unlawful activity . . ." (1st App. R. 4).[1] The second count charged that Mr. Hawthorne, on or about April 25, 1963, caused the wire facilities of the Western Union Telegraph Company to be used in interstate commerce "with intent to distribute the proceeds of an unlawful activity . . . in that he caused a Western Union Money Order representing the proceeds" from slot machines illegally kept in Ligonier, Indiana, in violation of Sections 10-2326 and 10-2328 of Burns Indiana Statutes, to be transmitted from Ligonier, Indiana, to Greenbrier County, in the Southern District of West Virginia, and that "thereafter, in the Southern District of West Virginia, the said James Russell Hawthorne did distribute and attempt to distribute the proceeds of the said unlawful activity to himself . . ." (1st App., R. 4-5).

The evidence with respect to the first count showed that Mr. Hawthorne, in October, 1962, moved his family from Indiana to West Virginia where he had a supper club which, in addition to the service of food and drinks, provided its patrons with facilities for gambling (1st App., R. 9-13). As

[1] The record with respect to the first appeal is designated herein as 1st App. and the record with respect to the second appeal is designated as 2nd App.

to the second charge, that of illegal use of interstate wire facilities, the evidence showed that $230.52 was wired to Mr. Hawthorne in West Virginia from Indiana, representing his share of the proceeds from several slot machines owned by him in partnership with another and kept on the premises of the Eagles Club, a private social club in Ligonier, Indiana (1st App., R. 5-8, 13-16).

A motion for judgment of acquittal was made at the close of the Government's case (1st App., R. 98-102). It was renewed after both sides had rested (1st App., R. 145-146), and, after it was denied, the attorneys for both sides submitted proposed instructions to the District Judge. Government's Requested Instruction No. 12 outlined the essential elements of the first count (1st App., R. 157). It included the requirement that the jury, in order to convict the defendant of illegal travel, must find that the defendant not only intended to establish a gambling enterprise in West Virginia, but also that he intended to violate the gambling laws of West Virginia. For some unexplained reason, however, the element of intent to violate local law was not included in the requested instruction with respect to the second count, Government's Requested Instruction No. 25 (1st App., R. 158).

The charge was given as requested, and as to the first count, the Judge said:

> "Now with respect to the elements which you must find with respect to count one, you must be convinced beyond a reasonable doubt that the defendant was guilty of each of the following things:
>
> "First, that he traveled in interstate commerce from Elkhart, Indiana, to a point near White Sulphur Spring, West Virginia.
>
> "Second, that James R. Hawthorne traveled with the intention to promote, manage, establish or carry on or

facilitate the promotion, management, establishment or carrying on of an unlawful activity, that is, illegal gambling in violation of the laws of the State of West Virginia at the 19th Hole Supper Club in White Sulphur Springs.

"The third element which you must find in regard to count number one would be that James R. Hawthorne beyond all reasonable doubt undertook the operation of the 19th Hole Supper Club and *that the operation of this club was intended to be carried on in violation of the gambling laws of West Virginia:* and fourth, that after James R. Hawthorne traveled in interstate commerce he performed or attempted to perform an act which tended to promote, manage, establish or carry on, or facilitate the promotion, management, establishment or carrying on of this unlawful activity.

"The last element is certainly self-evident, that you might have all the intentions in the world when you crossed the state line, but if you did not take any further steps after crossing the state line to implement this intent, then you would not be in violation of this particular federal law" (R. 165-166). (Emphasis supplied).

Repeating the inconsistency of the Government's proposals, the element of intent to violate local law was omitted from the charge as to the second count:

"The elements necessary to convict in the second count, are, first, that defendant Hawthorne wilfully caused the use of a facility in interstate commerce — to be exact, the wires of the Western Union Telegraph Company.

"Second, that he caused the use of these facilities with the intent to distribute the proceeds of an unlawful activity, that is, the slot machines in Indiana.

"Third, you would have to find that the slot machines were kept in violation of the law of the State of Indiana, and fourth, that after the telegram in question was sent defendant Hawthorne performed or attempted to

perform some act, which tended to distribute these proceeds" (1st App., R. 163-169).

The Petitioner was found guilty on both counts, and, after discharging the jury, the District Judge immediately sentenced him to two concurrent five year terms of imprisonment (1st App., R. 1-3).

The Court of Appeals, construing the statute narrowly in the light of its effect upon the constitutional right to travel, held that the trip from Indiana to West Virginia, charged in the first count of the indictment, was not sufficiently related to a gambling enterprise to bring it within the interdiction of the statute. There had been no exception to the failure of the District Judge to instruct that intent to violate local law was an element of the offense charged in the second count. The Court of Appeals, however, in obvious deference to the rule that failure to include in a jury instruction an essential element of the offense amounts to a derogation of the defendant's Sixth Amendment right to a jury trial and constitutes plain error cognizable on appeal, considered the question on its merits. See *Screws v. United States*, 325 U.S. 91, 107 (1945); *Byrd v. United States*, 342 F. 2d 939, 942 (D.C. Cir., 1965); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949). Whether such intent is necessary or not, the Court of Appeals held, is to be determined by the law of the place where the illegal enterprise was situated. Since the Indiana statute governing slot machines required no intent, the Court ruled that it was not a necessary ingredient of the federal offense and that the instruction was not deficient. The case was ordered to be remanded for reconsideration of the sentence imposed on the second count in light of the reversal as to the first. Thereafter, Mr. Hawthorne filed a timely petition for a writ of certiorari, which was denied, 384 U.S. 908 (1966).

The hearing on the remand was held by Judge John A. Field, Jr., who had conducted the original trial, on May 23, 1966, at Charleston, West Virginia. The Judge opened the hearing by remarking that, "Ordinarily I doubt that you would get a gratuitous remand in such a case, but the Court of Appeals has done that . . ." (2nd App., R. 1).

Counsel asked to be permitted to read the presentence report which had been prepared by the Probation Department while the charges in the case were first pending, prior to the trial (2nd App., R. 2-4). The Judge initially resisted, but then, deciding that he would make it available, explained that he was doing so because, "I don't want to waste a lot of time here because we have other matters this morning" (2nd App., R. 4). Counsel for the Petitioner made inquiry as to the extent of the remand, and the Judge, reiterating that the case had been remanded "gratuitously," continued, "and I must say to my mind for some obscure reason — and I don't appreciate it; we try these men, we try them fairly, we dispose of cases, and then to have a conviction affirmed and to send it back to take more time of the Court, I can't see the justification in it from the Court of Appeals, but they have done it . . ." (2nd App., R. 6-7).

In pronouncing sentence, the Judge once again repeated, "I can't understand sending the case back . . .," announcing, however, that he would endeavor to put aside "my irritation with my brethren on the Court of Appeals" and "the irritations that this man placed on the Court from time to time" (2nd App., R. 7-8). The original sentence was then amended, committing Mr. Hawthorne to the custody of the Attorney General for a term of two years (2nd App., R. 8, 11-12). As the Judge himself stated four days later, however, he did not enter this order in the exercise of his discretion based upon an objective analysis of the case, but

he was only "heeding the hint, you might say, or suggestion of the Court of Appeals . . ." (2nd App., R. 9; accord, 2nd App., R. 11-12).

Mr. Hawthorne was ordered into custody forthwith, and immediately after the sentencing, his counsel advised the Court that an appeal would be taken, requesting that bail be set pending appeal. Judge Field denied bail (2nd App., R. 12) and application was then made to Judge Boreman of the Court of Appeals. Judge Boreman ordered that Mr. Hawthorne be released on $5,000.00 bail.

On May 27, 1966, counsel for the Petitioner, who was otherwise engaged, requested that an associate of his accompany a bondsman to the District Court for the posting of the bail (App. 9). Judge Field, in an extraordinary action, called a hearing in open court, saying that:

> "What I am interested in finding out is what is Mr. Hawthorne appealing from? Does he want me to reinstate the five-year sentence which I pronounced on him back in Beckley in November '64? I will entertain a motion to set aside my action of May 23 and reinstate the original sentence if that's what the defendant wants" (2nd App., R. 8-9).

When the associate pleaded that he had "never even heard of this case until today," the Judge replied, "You are more fortunate than the Court" (2nd App., R. 9).

In response to the associate's further apology that he was unfamiliar with the case, the Judge continued:

> "I found it difficult to understand why the Court of Appeals had remanded it at all except as a discretionary matter; in other words, urging the Court to reconsider the sentence on the second count since they felt the primary offense represented by the first count had been reversed, but I must confess that when a man is convicted on the second count and the conviction is

affirmed and certiorari is denied from the affirmance of that conviction and the conviction on the second count is sufficient to uphold the sentence, and then it is sent back down here and heeding the hint, you might say, or suggestion of the Court of Appeals, I reduced it from five to two, it is outside any jurisprudence or any policy or any theory that I ever heard of that it would be an appealable order.

"Evidently Judge Boreman felt otherwise and, of course, if he tells me to take the bond I have to take the bond, but I want it to show on the record that if the Court of Appeals feels that I was in error in anything I did Monday, I am perfectly willing to reinstate the five year sentence, and if I have an opportunity and it is sent back here, I am not at all sure that I won't" (2nd App., R. 9-10).

Judge Field then terminated the hearing by saying:

"I will say something else on the record. This man posted a $10,000 bond when he was convicted in Beckley on the two counts. He now stands with a conviction on the second count affirmed, and again if the Court of Appeals is so unrealistic as to accept fifty per cent of the original bond, that's up to them, and I want that all on the record, too. I want it to go down to Richmond along with everything else in this fiasco.

"All right, gentlemen, we will adjourn" (2nd App., R. 10).

REASONS FOR GRANTING THE WRIT

I.

THE FAILURE OF THE COURT OF APPEALS IN THE SECOND APPEAL TO HOLD THAT THE RECORD DEMONSTRATED INCAPACITATING BIAS AT THE HEARING ON REMAND RAISES IMPORTANT QUESTIONS WITH RESPECT TO THE SIXTH AMENDMENT AND THE SUPERVISORY POWERS OF FEDERAL APPELLATE COURTS.

When there is reason to know that judicial bias or prejudice exists prior to trial, the mode for disqualification is

an affidavit of prejudice pursuant to 28 U.S.C.A., Section 144.[2] See, Note, Disqualification of Judges for Bias in the Federal Courts, 79 HARV. L. REV. 1435 (1966). When, however, as in this case, the bias is first disclosed in the course of the proceeding, ". . . the statute is not applicable and reviewing courts will use their normal powers to assure a fair trial to set aside a judgment tainted by bias." 2B BARRON AND HOLTZOFF, Federal Practice and Procedure, Sec. 902, p. 95 (Wright Ed., 1961). Under such circumstances, the claimed bias or prejudice, ". . . necessarily becomes a matter of alleged prejudicial error and for correction by the Court of Appeals." *Knapp v. Kinsey*, 235 F. 2d 129, 131 (6th Cir., 1956), cert. den., 352 U.S. 892 (1956); see also, *Berger v. United States*, 255 U.S. 22, 34 (1921); *Lucas v. United States*, 325 F. 2d 867, 869-70 (9th Cir., 1963); *Hurd v. Letts*, 152 F. 2d 121, 122 (D.C. Cir., 1945); *Whitaker v. McLean*, 118 F. 2d 596 (D.C. Cir., 1941).

It needs no elaboration that, "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136. See also, *Tumey v. Ohio*, 273 U.S. 510; *cf. Shephard v. Maxwell*, 384 U.S. 333; *Irvin v. Dodd*, 366 U.S. 717. A judge is incapacitated for bias or prejudice, this Court declared long ago in *Berger v. United States*, 255 U.S.

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[2] It provides:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party; such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

22, 33-34, if he is ". . . of a bent of mind that may prevent or impede impartiality of judgment." See also e.g., *Tucker v. Kerner*, 196 F. 2d 79, 84 (7th Cir., 1950); *Eisler v. United States*, 170 F. 2d 273, 278 (D.C. Cir., 1948), removed from the docket, 338 U.S. 189.

A District Judge who had permitted "an infusion of personal animosity" in the trial of a lawyer who had allegedly committed a contempt in his presence, and who had "revealed an attitude which hardly reflected the restraints of conventional judicial demeanor", was held, in *Offutt v. United States*, 348 U.S. 11, 16, 12, to have demonstrated bias and prejudice which disqualified him from trying the case or imposing punishment. Without the need to decide the case on the constitutional level of due process, this Court found that the existence of bias required it to exercise its supervisory authority over the administration of criminal justice in the federal courts. 348 U.S. 11, 13.

The test for incapacitating bias, Mr. Justice Frankfurter said for the Court in *Offutt*, is an objective one:

> "The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice." 348 U.S. 11, 14 (Emphasis supplied.)

See also *Public Utilities Com'n. v. Pollak*, 343 U.S. 451, 466-67 (Frankfurter, J., explaining his reasons for not participating). Disqualifying prejudice exists under this test if the circumstances are such as to create in the mind of a reasonable man a suspicion of bias, without regard to whether or not bias exists in fact. As the Court of Appeals for the Third Circuit recently declared: "For the proper

administration of justice requires a judge not only actual impartiality, but also the appearance of a detached impartiality." *Rapp v. Van Dusen*, 350 F. 2d 806, 812 (3rd Cir., 1965); accord, *Texaco, Inc. v. Chandler*, 354 F. 2d 755, 657 (10th Cir., 1965), cert. den., 383 U.S. 936. See Schwartz, Disqualification for Bias in the Federal District Courts, 11 U. PITT. L. REV. 415 (1950); Forer, Psychiatric Evidence in the Recusation of Judges. 73 HARV. L. REV. 1325 (1960). In other words, ". . . our system of law has always endeavored to prevent even the probability of unfairness." In *re Murchison*, 349 U.S. 133, 136.

The remarks of a judge in the conduct of the proceedings may be considered persuasive evidence of bias. As the Court of Appeals for the District of Columbia noted in *Whitaker v. McLean*, 118 F. 2d 596 (D.C. Cir., 1941):

> "The judge may, as indeed he insisted, have felt no hostility to the plaintiff, and in that view he was, subjectively, free from bias. But bias must be considered objectively. Few, if any, judges would make the reported remarks, in the course of a trial, unless they had developed definite and positive hostility to plaintiff and his case. Hostility is a form of bias."

It might also be said that few, if any, judges would have felt compelled to articulate "irratation" at the defendant and the Court of Appeals or to convene a subsequent and otherwise unnecessary hearing for the same purpose, if they had not developed hostility of the sort described in *Whitaker*. See *Moskun v. United States*, 143 F. 2d 129, 130 (6th Cir., 1944), where the District Judge in a naturalization proceeding had "expressed his indignation in robust extra-judicial language" and the Court of Appeals reversed the judgment and remanded the cause "for retrial by another judge in an atmosphere of judicial calm." See also, *Gladstein v. McLaughlin*, 230 F. 2d 762 (9th Cir., 1955); *Connelly v. United States District Court*, 141 F. 2d 692

(9th Cir., 1951); *United States v. Drum*, 329 F. 2d 109 (1st Cir., 1964); *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F. 2d 804 (9th Cir., 1963); cert. den., 375 U.S. 821 (1963).

The remarks of the District Judge here, in the extraordinary hearing of May 27, 1966, serve to illustrate further the bias with which he had approached his task of reconsideration of the sentence. See also, *Calhoun v. Superior Court of San Diego County*, 331 P. 2d 648 (Cal., 1958) (In Banc), where a trial judge filed an affidavit opposing an accused's release on bail pending disposition on appeal, saying that the appeal was taken for the purpose of delaying justice, and the Supreme Court of California, In Banc, held that this act disclosed a bias and prejudice against the accused as to the issues to be tried; *State v. Nunes*, 205 A. 2d 24 (R.I., 1964), where comments at a hearing after the trial were held to have demonstrated the judge's bias during the trial.

It is obvious that the requirement of "a fair trial in a fair tribunal . . . ," In *re Murchison*, 349 U.S. 133, 136, pertains to sentencing as well as other proceedings in a criminal trial. In *Saldana v. United States*, 365 U.S. 646, 647, this Court set aside convictions under three counts of an indictment, agreeing with the Solicitor General, who suggested during oral argument, "that the combination of circumstances in this case, beginning with one judge's clearly expressed intention to impose a five-year sentence, and ending with another judge's imposition of a twenty-year sentence under the indictment, was not consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts." The importance of sentencing proceedings and of having sentences passed by an unbiased judge is well reflected in Judge Kaufman's comment that:

> ". . . if the hundreds of American Judges who sit on criminal cases were polled as to what was the most trying facet of their jobs the vast majority would certainly answer 'Sentencing'. In no other function is the judge more alone; no other act of his carries greater potentials for good or evil than the determination of how society will treat its transgressors." Kaufman, Introductory Remarks — Appellate Review of Sentences: A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit, 32 F.R.D. 257, 261 (1962).

As then Attorney General Kennedy said, in sentencing we must "reject the spirit of retribution and attempt cooly to balance the needs of deterence and detention with the possibilities of rehabilitation. It is a subtle, risky and complex balance to achieve, but by and large, the judiciary has achieved it." Kennedy, Address at Seminar and Institute on Disparity of Sentences for the Sixth, Seventh and Eighth Judicial Circuits, 30 F.R.D. 422, 427 (1961). (Emphasis supplied.) See also, Parsons, The Personal Factor in Sentencing, 13 DEPAUL L. REV. 1, 8-10 (1963); Parsons, Aids in Sentencing, 35 F.R.D. 423, 424-25 (1964); Kaufman, Introductory Remarks — Appellate Review of Sentences: A Symposium of the Judicial Conference of the United States Court of Appeals for the Second Circuit, 32 F.R.D. 257, 258-59 (1962). The sentencing function, requiring as it does the exercise of the most complex and sensitive discretion, cannot be fairly and constitutionally performed by a biased judge. Cf. *Connelly v. United States District Court*, 191 F.2d 692, 697 (9th Cir., 1951), where a District Judge, found to be biased as a result of extra-judicial remarks, was ordered "to take no action in any matter affecting petitioner respecting his contentions regarding bail . . ."

In the instant case, just as this court observed in *Offut v. United States*, 348 U.S. 11, 17 (1954), "The record dis-

closes not a rare flare-up, not a show of evanescent irritation — a modicum of quick temper that must be allowed even judges. The record is persuasive that instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with the petitioner." Judge Field's ". . . behavior precluded that atmosphere of austerity which should especially dominate a criminal trial . . .", ibid, and all too amply demonstrated the kind of bias that raises a substantial Sixth Amendment issue and gives rise to the occasion for the exercise of supervisory authority over the conduct of criminal proceedings in the federal courts.

II.

THE HOLDING OF THE COURT OF APPEALS IN THE FIRST APPEAL THAT INTENT TO VIOLATE STATE LAW IS NOT NECESSARILY AN ELEMENT OF THE OFFENSE UNDER 18 U.S.C.A., SEC. 1952, INVOLVES IMPORTANT QUESTIONS OF THE INTERPRETATION OF A FEDERAL CRIMINAL STATUTE WHICH SHOULD BE SETTLED BY THIS COURT.

A. *The Court of Appeals has departed from the general policy that, absent clear congressional purpose to the contrary, acts innocently performed should not be punished.*

This Court issued its most elaborate statement on the requirement of mens rea in penal statutes in *Morissette v. United States*, 342 U.S. 246. Punishment for acts performed without evil intent, the Court said, is generally "inconsistent with our philosophy of criminal law." Id., at 250. The Court continued: "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." Ibid.

The Court agreed with the late Roscoe Pound's observation that: "Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." Id. at 250 n. 4, quoting from Pound, Introduction, SAYRE, CASES ON CRIMINAL LAW (1927). See also, *United States v. Fox*, 95 U.S. 670 (1878). More recently this Court announced that in some circumstances mens rea is a constitutional requisite. *Lambert v. California*, 355 U.S. 225; *Smith v. California*, 361 U.S. 147. And, Professor Gerhard Mueller, commenting on *Lambert*, observed that: "The Court has reaffirmed the proposition, long forgotten by many, that mens rea is an ethicolegal concept. Absolute criminal liability is beginning to end in America." Mueller, On Common Law Mens Rea, 42 MINN. L. REV. 1043, 1104 (1958); Accord, WILLIAMS, CRIMINAL LAW — THE GENERAL PART, 46-48 (1961).

In *Morissette* it was, however, recognized that after the turn of this century a limited class of minor offenses was created that are punishable without guilty intent as an element. The distinguishing characteristic of this class of offenses is that ". . . penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." 342 U.S. at 256. Speaking earlier and underscoring the importance of the possible penalty, Professor Sayre said: "If this be serious, particularly if the offense be punishable by imprisonment, the individual interest of the defendant weighs too heavily to allow conviction without proof of a guilty mind." Sayre, Public Welfare Offenses, 34 COLUM. L. REV. 55, 72 (1933). In the instant case, the Indiana slot machine statute, Burns Indiana Statutes, Secs. 10-2326-2328, which required no criminal intent, made violation only a misdemeanor punishable by a maximum fine

of $500.00 to which might be added imprisonment not exceeding 6 months. Since under the Indiana statute, intent was not an element of the state offense, the Court of Appeals ruled that it was not an element of the federal offense under 18 U.S.C.A., Sec. 1952, notwithstanding the fact that violation of section 1952 is a felony punishable by imprisonment of five years and a fine of $10,000.00. In so doing, the Court of Appeals failed to give the important factor of extent of punishment the consideration which it was due.

B. *The Court of Appeals failed to give weight to the applicable legislative history of 18 U.S.C.A., Sec. 1952 which confirms congressional purpose that intent to violate local law be on element of the offenses under the statute.*

The Court of Appeals, in addition, overlooked the teaching of the *Morissette* case that whether mens rea is an essential element of a federal offense should be determined in light of congressional purpose as revealed by legislative history. Section 1952, in terms, requires "intent to . . . carry on . . . unlawful activity," and its legislative history is replete with evidence that it was the purpose of Congress that intent to violate local law be an essential element of offenses under the statute. As Senator Kefauver observed during the Senate hearings, "if a person is going into a State for the purpose of committing certain crimes, then he would be in violation of Federal Law." Senate Judiciary Committee Hearings, The Attorney General's Program to Curb Organized Crime and Racketeering, 87th Cong. 1st Sess. (1971), p. 94. (Emphasis supplied.) Further evidence of congressional purpose is found in the comments which were addressed to an alternative statute which the American Bar Association had endorsed and which was introduced by Senator Keating as Senate Bill 710. Senate Hearings, pp. 95-96. The ABA proposal was drawn in language

somewhat more traditional to the criminal law and labelled a "conspiracy" statute. It set forth, in explicit terms, the requirement of intent "to commit any organized crime offense against any of the several states."[3] When Assistant Attorney General Miller appeared to sponsor the administration bill, later enacted as Section 1952, he commented that the ABA proposal "does substantially the same thing." Senator Keating inquired: ". . . [T]hat bill, S. 710, would cover all those offenses that would be covered by your bill, would it not?" "Oh, yes, sir," Mr. Miller replied. "And of course," Senator Keating continued, "it would go considerably further." Mr. Miller agreed again, commenting that he "would certainly personally have no objection" to S. 710. Senate Hearings, Id., p. 111.

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[3] S. 710 would have amended Title 18 of the United States Code by adding the following as Section 373:

"§373, Conspiracy to commit organized crime offense against any of the several States.

"If two or more persons conspire to commit any organized crime offense against any of the several States, and one or more of such persons, to effect the object of the conspiracy, delivers for shipment or transports in interstate commerce any article, or deposits in the mail or sends or delivers by mail, any letter, package, postal card, or circular, or transmits or causes to be transmitted in interstate commerce any message or communication by wire or radio, or receives any article, letter, package, postal card, circular, message, or communication after such shipment, transportation, sending, delivery, or transmission, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If however, the offense, the commission of which is the object of the conspiracy, is punishable by a lesser maximum fine or imprisonment than provided in this section, the maximum punishments for such conspiracy shall not exceed such lesser maximums.

"As used in this section, the term 'organized crime offense' means any offense proscribed by the laws of or the common law as recognized in any State relating to gambling, narcotics, extortion, intorixating liquor, prostitution, criminal fraud, or false pretenses, or murder maiming, or assault with intent to inflict great bodily harm, and punishable by imprisonment in a penitentiary or by death."

One compelling reason for requiring the element of intent to commit a local crime is the fact that gambling laws differ so greatly among the States. As Mr. Miller noted in the course of his testimony, Nevada has general legalized gambling, some states permit general legalized gambling in some of their counties under local option provisions, other states sanction certain lottery games and other games of chance. Senate Hearings, Id., p. 295. Furthermore, in their comprehensive study, Bauman and King observed that "Slot machines and related devices are adequately covered by the laws of only a few states . . ." Bauman and King, A Critical Analysis of the Gambling Laws, in Organized Crime and Law Enforcement (Ploscowe, Ed., 1952, The Report By and Research Studies Prepared for the American Bar Association Commission on Organized Crime). They also reported that:

> "States having no specific slot machine statutes attempt to deal with the problem in various ways. Most prevalent is a prohibition against the 'keeping of gambling devices' relied upon by seventeen states. This type of statute is directed only at the 'keeper' of the device. Lack of definitions as to what constitutes a 'gaming device' embroils law enforcement authorities in litigation with seasoned slot machine lawyers. Only four states avoid the problem by listing the slot machine as a specifically prohibited gaming device." Id., at 101-02.

Some states have given slot machines official sanction, for "it must be remembered that such machines are licensed and allowed to operate legitimately in a few states." Id., at 111, n. 66.

It is not lightly to be assumed, as the Court of Appeals did here, that Congress failed to "define what it desired to punish but referred the citizen to a comprehensive law library in order to ascertain what acts were prohibited."

Screws v. United States, 325 U.S. 91, 96. In other instances, it should be noted, where federal legislation was enacted under the commerce clause to implement State policy, Congress, in deference to the problems inherent in varying local statutes, has required intent to commit a local offense as an element of the federal crime. The Webb-Kenyon Act, 37 Stat. 699 (March 1, 1913), for example, which was upheld in *Clark Distilling Co. v. West'n. Md. Ry. Co.*, 242 U.S. 311, prohibited the interstate shipment of intoxicating liquor by persons who intended that it be received, possessed, sold or used in violation of the law of the state to which it was shipped.[4] Similarly, the Ashurst-Summers Act, 49 Stat. 494 (July 24, 1935), held constitutional in *Kentucky Whip & Collar Co. v. Illinois Cent. R. Co.*, 299 U.S. 334, made it a crime to transport prison made goods into any State where it was intended that they be received, possessed, sold or used in violation of local law. There is no valid reason why Section 1952 should be read, as the Court of Appeals did here, in a manner inconsistent with the statutes on which it is patterned. The fact that the federal statute is superimposed upon state legislation is a further reason for narrow construction, for such a construction "more nearly pre-

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[4] The Clark Distilling Company case has been the basis on which Section 1952 has been sustained against challenges to its constitutionality:

> "By appellants' second Specification it is claimed that Title 18 U.S.C. §1952 is unconstitutional because it denies equal protection of the laws on the theory that, if read to apply only in states where gambling is illegal, residents of such states are discriminated against and hence denied equally under the law guaranteed by the due process clause of the Fifth Amendment.
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> "Legislation which constitutes an exercise by Congress of its plenary power over commerce is not repugnant to the due process clause of the Fifth Amendment merely because of variation in State Laws. Clark Distilling Company v. Western Maryland Railway Company, 242 U.S. 311, 37 S. Ct. 180, 61 L. Ed. 326 (1916). Cf. United States v. Ryan, 213 F. Supp. 763, 766 (D.C. Colo., 1963)." Turf Center, Inc. v. United States, 325 F. 2d 793, 795-796 (9th Cir., 1963).

serves the traditional balance between the States and the national government in law enforcement . . ." *Screws v. United States*, 325 U.S. 91, 106, citing *Apex Hosiery Co. v. Leader*, 310 U.S. 469; see also, *United States v. Five Gambling Devices*, 346 U.S. 441.

C. *The Court of Appeals adopted a reading of the statute that raises a substantial constitutional question in that the statute, if so read, impinges on the constitutional right to travel.*

In its interpretation of Section 1952, the Court of Appeals failed to give full force to the twin doctrines, articulated by this Court, that criminal statutes are to be strictly construed, see, e.g., *Bell v. United States*, 349 U.S. 81, 83-84; *FCC v. ABC*, 347 U.S. 284, 296; *United States v. Halseth*, 342 U.S. 277, and that statutes are to be construed, where possible, to avoid significant constitutional issues, e.g., *Rosenberg v. Fleuti*, 374 U.S. 449; *Kent v. Dulles*, 357 U.S. 116; *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192. The Court of Appeals expressly applied the avoidance doctrine when, faced with the constitutional right to travel, it held that the act of travel charged in the first count in the indictment was not within the statute. When dealing with the second count, however, the Court of Appeals overlooked the fact that the intent element in Section 1952 violations is the same whether the act charged involves travel or use of an interstate facility. Thus the Court of Appeals failed to appreciate the deleterious effect upon the right to travel that was inherent in its decision. Conviction for travel without mens rea has an effect on the right to travel no less chilling than the effect upon free speech of a statute that punishes a seller of prohibited books who lacks scienter. See *Aptheker v. Rusk*, 378 U.S. 500; *Smith v. California*, 361 U.S. 147. See also, *Lambert v. California*, 355 U.S. 225, where a convicted felon registration ordinance, having an

obviously restrictive effect on the right to travel, was voided because it did not incorporate the element of mens rea. Cf., e.g., *Edwards v. California*, 314 U.S. 160; *Kent v. Dulles*, 357 U.S. 116; CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION of 1787 (1956) 162-213. The importance of construing Section 1952 in the light of its effect upon the right to travel is highlighted by the fact that the legislative history of the statute is replete with demonstrations of congressional concern to avoid passage of a provision that would impinge too much on this constitutional right. Anxiety on the part of the members of both houses was best exemplified by Senator Carroll's statement, specifically agreed to by Senator Kefauver, that "this whole concept if imposing new restrictions on travel, no matter how urgent the necessity, I think holds many dangers as to the possible expansion of the Federal police powers."[5]

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[5] Senate Hearings, p. 262; see also, e.g., Id. at 253-62; Hearings Before Subcommittee No. 5 of the House Judiciary Committee, Legislation Relating to Organized Crime, Serial No. 16, 87th Cong. 1st Sess. (1961), pp. 337-39; cf. Senate Hearings, p. 16 (Attorney General Kennedy).

Almost a decade before the passage of this provision, Professor Ivan Rutledge prophetically made the same analysis in his comprehensive study, Regulation of the Movement of Workers: Freedom to Passage Within the United States, 1953 Wash. U.L.Q. 270, 290; "This kind of regulation would, it seems amount to an expansion of the area of conduct that can be made criminal considerably beyond the traditional limits of criminal attempts."

It should be noted that numerous witnesses brought the constitutional difficulties to the attention of the Judiciary committee of each house. Senate Hearings, pp. 50-51 (American Civil Liberties Union memorandum); House Hearings, pp. 385-86 (same); Senate Hearings, pp. 94-95 (Mr. Rufus King, President of the American Bar Association); House Hearings, pp. 61-63; (Professor Louis B. Schwartz, University of Pennsylvania Law School); Id. at 145, *passim* (Mr. Harris B. Steinberg, president of the National Association of Defense Lawyers in Criminal Cases, and chairman of the Criminal Courts Committee of the New York State Bar Association); Id. at 159, 162 ("Report on Proposed Federal Anti-racketeering Legislation," of the National Association of Defense Lawyers in Criminal Cases); Id. at 179-80 (Mr. Martin M. Nelson, on behalf of the Bally Manufacturing Company, Chicago, Illinois).

CONCLUSION

It is respectfully submitted that for the foregoing reasons this petition for a writ of certiorari should be granted.

ARNOLD M. WEINER,
Ten Light Street,
Baltimore, Maryland 21202,

SANFORD JAY ROSEN,
School of Law,
University of Maryland,
Baltimore and Greene Streets,
Baltimore, Maryland 21201,

Counsel for Petitioner.

APPENDIX A

United States Court of Appeals
For The Fourth Circuit

No. 9817

United States of America,

Appellee,

versus

James Russell Hawthorne,

Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Beckley. John A. Field, District Judge.

(Argued December 9, 1965. Decided February 3, 1966.)

Before Haynsworth, Chief Judge, and Sobeloff and J. Spencer Bell, Circuit Judges.

Arnold M. Weiner and Sanford Jay Rosen (Court-assigned counsel for Appellant), and Alfred N. King, Attorney, Department of Justice, (Milton J. Ferguson, United States Attorney, on brief) for Appellee.

J. SPENCER BELL, Circuit Judge:

The defendant, James Russell Hawthorne, was convicted by a jury of two charges of use of interstate facilities to promote illegal gambling enterprises and sentenced to con-

current five year terms of imprisonment.[1] The first count involved a trip made by the defendant on or about October 11, 1962, from Indiana to West Virginia. The second count involved the use of the facilities of Western Union to transfer $235.00, proceeds from several slot machines owned by the defendant and operated by his partner in Indiana, from that state to the defendant in West Virginia.

The evidence considered favorably to the government showed that early in 1962 the defendant went from his home in Indiana to Greenbrier County, West Virginia, where he investigated the possibility of opening a supper club which would provide gambling facilities to its patrons, in violation of the local law.[2] He discovered that one of

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[1] 18 U.S.C.A., Section 1952, provides:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

[2] The West Virginia statute:

"Any person who shall keep or exhibit a gaming table, commonly called A. B. C. or E. O. table, or faro bank, or keno table, or any other gaming table or device of like kind, under any denomination, or which has no name, whether the game, table, bank or device be played with cards, dice or otherwise, or shall be a partner, or concerned in interest, in keeping or exhibiting such table, bank or gaming device of any character, shall be guilty of a misdemeanor, and, upon

the existing establishments could be rented and by June had proceeded as far as to discuss the possibility of renting paraphernalia with one of the government witnesses. In early summer Hawthorne returned to West Virginia and made further arrangements for operating his business. He had a corporation set up and entered into a six year lease beginning October 1, 1962. He then returned to Indiana in order to move his family to West Virginia. On October 2, 1962, Hawthorne and his wife purchased a mobile home in Elkhart, Indiana, for delivery to the premises of his supper club at White Sulphur Springs, West Virginia. On October 11th two tanks of bottled gas were connected up to the trailer. It was this trip which occurred on or about the 11th of October which was charged in the first count of the indictment.

It is freely conceded by the government that the immediate purpose of this trip was to move Hawthorne's family from Indiana to the new home. Such a purpose is not sufficiently related to his gambling enterprise to bring it within the interdiction of the statute. We cannot hold that the purpose of that trip was to 'promote, manage, establish, carry on, or facilitate . . .' his unlawful enterprise within the meaning of the statute. The statute was intended to make interstate travel or transportation in aid of racketeering enterprises a crime.[3]

It is not the intent of the statute to make it a crime per se for one who operates a gambling establishment to travel interstate. To so hold might raise serious questions of the constitutionality of the Act. See *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); *Kent v. Dulles*, 357 U.S. 116 (1958); *Zemel v. Rusk*, 381 U.S. 1 (1965). The government cites no case which supports its position. *Masse v. United States*, 210 F. 2d 418 (5 Cir. 1954), *cert. denied*, 347 U.S. 962, a

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conviction, shall be confined in jail not less than two nor more than twelve months and be fined not less than one hundred nor more than one thousand dollars. . . ." West Virginia Code of 1961, Chap. 61, Art. 10, § 1.

[3] See generally: Senate Judiciary Committee Hearings, The Attorney General's Program to Curb Organized Crime and Racketeering, 87th Cong. 1st Sess. (1961).

Mann Act case, is not in point. While there it is true the court found that Masse was guilty even though his immoral conduct was not the sole purpose of *his* trip (he also travelled to get a divorce) the substantive offense in the Mann Act is the transportation of the female, not the interstate travel of the transporter himself. *United States v. Sapperstein*, 312 U.S. 694 (4 Cir. 1963); *Williams v. United States*, 271 F. 2d 703 (4 Cir. 1959). In the instant case, however, the essential element of the crime is the interstate travel of the offender himself. We do not rest our decision on the fact that the first proven overt act of gambling did not occur until nearly five months after the trip in question. Other trips Hawthorne took prior to that charged in count one of the indictment were directly related to his enterprise, but the connection with this specific trip is too tenuous. Cf. *Parr v. United States*, 363 U.S. 370 (1960).

We think the defendant was properly convicted under the second count. We do not think the statute (18 U.S. C.A. § 1952) requires proof that the defendant knew that he was violating the Indiana law by operating slot machines in that state, although there was evidence from which the jury could have so found. Such knowledge was not required to convict under the Indiana statute. *Worl v. State*, 243 Ind. 116, 183 N.E. 2d 594 (Sup. Ct. 1962), and we think it sufficient under section 1952 that the defendant knowingly caused to be transmitted interstate by the Western Union money order proceeds of a gambling enterprise which was unlawful under the Indiana statute. Since we have held that the conduct charged in the first count did not violate the statute in question, we remand the case to the district court in order that the judge may reconsider the sentence given on the second count in the light of this opinion.

Reversed and Remanded.

APPENDIX B

United States Court of Appeals
For The Fourth Circuit

No. 10,664

United States of America,

Appellee,

versus

James Russell Hawthorne,

Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. John A. Field, Jr., District Judge.

(Argued October 4, 1966. Decided December 12, 1966.)

Before Sobeloff, J. Spencer Bell and Winter, Circuit Judges.

Arnold M. Weiner (Sanford Jay Rosen on brief) for Appellant, and Alfred N. King, Attorney, Department of Justice, for Appellee.

PER CURIAM:

James Russell Hawthorne was convicted by a jury on two counts of an indictment charging the use of interstate facilities to promote illegal gambling enterprises, and received 5-year sentences on each count, to be served concurrently. In *United States v. Hawthorne*, 356 F. 2d 740 (4th Cir.), *cert. denied*, 384 U.S. 908 (1966), we reversed the conviction on the first count, but affirmed the conviction on the

second, and remanded the case so that the District Court might reconsider the sentence on the remaining count in light of our action.

On remand, the District Judge, after a hearing in which he carefully considered the Court of Appeals opinion, the presentence investigation, statements made by defense counsel, and the defendant's allocution, entered an order reducing Hawthorne's sentence from five years to two. The revised sentence was appealed to this court.

After hearing the earnest and skillful argument of counsel for the defendant upon the merits of the present appeal, and having considered the additional briefs filed by the parties, this court finds no error in the sentencing procedures.

The judgment of the District Court, as revised, is

Affirmed.

APPENDIX C

18 U.S.C.A., Section 1952:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

Amendment 5, Constitution of the United States of America:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy

in life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 6, Constitution of the United States of America:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Burns Indiana Statutes:

"10-2326. Slot machines — owning, operating, possessing or contracting with user, prohibited. — It shall be unlawful: (a) To manufacture, own, store, keep, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or to offer to sell, rent, lease, let on shares, lend or give away, or to permit the operation of, or for any person to permit to be placed, maintained, used or kept in any room, space or building owned, leased or occupied by him or under his management or control, any slot machine or device as hereinafter defined; or

"(b) To make or to permit to be made with any person any agreement with reference to any slot machine or device, as hereinafter defined, pursuant to which the user thereof, as a result of any element of chance or other outcome unpredictable to him, may become entitled to receive any money, credit, allowance, or thing of value or additional chance or right to use such machine or device, or to receive any check, slug, token or memorandum entitling the holder to receive any money, credit, allowance or thing of value."

"10-2328. Slot machines — Penalty for violation of act — Seizure. — Whoever shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five [$25.00] nor more than five hundred dollars [$500] to which may be added imprisonment for any period not exceeding six [6] months. Upon conviction of any offender for a violation of this act, the court shall order the sheriff to seize any slot machine or gambling device prohibited by this act, and involved in such cause, the same not being in the possession of any peace officer of this state, and shall order the destruction of such machines or devices so seized by the sheriff, and the court shall also order the destruction of any machine or device as may be in the custody of any peace officer of this state, and involved in such cause."

Amendment 9, Constitution of the United States of America:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."